In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 298

DANIEL CONSTRUCTION COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 20–39) is reported at 341 F. 2d 805. The Board's Decision and Order (Pet. 41–78) are reported at 145 NLRB 1397.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order was entered on January 11, 1965 (Pet. 21). A petition for rehearing was denied on March 29, 1965 (Pet. 40). The petition for a writ of certiorari was filed on June 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company threatened its employees with loss of employment if they selected the Union as their collective bargaining representative and promised them continued employment if they rejected the Union.

2. Whether the court of appeals had jurisdiction to review a Board representation decision which did not form the basis of an unfair labor practice order before the court.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at pages 16–19 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 21, 1961, pursuant to a petition filed by the Union[1] under Section 9 of the Act, the Board directed an election among the pipefitters employed by the Company in the mechanical department of its Greenville division. The Greenville division at the time of the petition employed about 600 pipefitters at various projects. (Pet. 79–84.)[2] For a period of sev-

[1] United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.

[2] The Board determined that certain pipefitters not in the Company's employ at the time of the petition had a substantial continuing interest in the Company's conditions of employment because of their intermittent employment on the Company's construction projects and their expectancy of future employment. It therefore extended voting eligibility to employees in the bar-

eral weeks prior to the election, scheduled for November 16, 1961, Executive Vice President Buck Mickel and Mechanical Department Manager Theodore Johnson, accompanied by Personnel Director Barrington King, toured the job sites and spoke to groups of pipefitters about the election. They visited about 15 projects and made between 25 and 30 speeches. Mickel, who always spoke first, had no written speech but attempted to give the same talk each time. Johnson covered any points he thought needed further explication. (Pet. 46–47, 51, 52; J.A. 339–345, 399–400.)[3]

Mickel and Johnson stressed in their speeches (1) that the Company would lose business if unionized; (2) that the Company was able and willing to keep the pipefitters at work under existing conditions; and (3) that the election would be futile because of the Company's intention to continue hiring "at the gate" and to litigate for years the propriety of the Board's election order (Pet. 46–55). For example, Mickel told 140 pipefitters at one project that the Company did not think that it "could compete or get as many jobs as [it] would without being union," but that the men could expect continued employment when the job was over if the Company "remained non-union" and that they should contact their foremen about jobs; that the Company "regardless of how the election went" would continue to hire its employees "through

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gaining unit who had worked for the Company for 30 days or more during the preceding 12 months, or for 45 days or more during the preceding 24 months including some time during the preceding 12 months. (Pet. 82–84.)

[3] "J.A." refers to the Joint Appendix in the court below.

the gate, without coming through a business agent"; and that, if the Union won the election, the Company would protest the "absentee ballots" and "keep it in court for from eight to ten years" (Pet. 48; J.A. 129–130). Johnson told the employees at another project that "industry is coming south to get away from the Union" and that the Company was "negotiating a lot of jobs now" which the employees would not get "if we vote to go union"; that their foreman would hire anyone who wanted to go with him to another project when the present job ended, but the Company would never hire through a union business agent; and that the Company had been assured by its lawyers that they could keep the matter of voting at the election "in court for ten years if necessary" (Pet. 47; J.A. 113). At two other projects, the pipefitters were told by Mickel and Johnson that the Company's customers preferred a nonunion contractor and that the Company felt it would not get as many jobs if it were union; that the Company would continue to hire at the gate even if the Union won the election; and that the Company would tie the election up in court for a number of years (Pet. 46–47, 49, 50; J.A. 140–141, 149–150, 175–176, 234–236).

Also during the pre-election period, foremen at one project told employees that they had been instructed to find out how they felt about the coming election and report back to management (Pet. 55–56); a foreman at another project polled his men several times on whether they were "for or against" the Union (Pet. 43); and foremen at several projects questioned employees about their union views and threatened

employees with economic reprisals because of their union activities (Pet. 42–43, 56–59, 61–65).

The election was held as scheduled on November 16, 1961, and the Union lost by a vote of 684 to 247 (Pet. 45; J.A. 23).

B. THE BOARD'S DECISION AND ORDER

The Board found that the pre-election speeches of Vice President Mickel and Mechanical Department Manager Johnson violated Section 8(a)(1) of the Act because, considered as a whole, they threatened the employees with loss of employment if the Union won the election and promised them continued employment if the Union were defeated (Pet. 41, 67–68). The Board also found that the Company further violated Section 8(a)(1) of the Act by instructing foremen to inquire and report on the union views and sympathies of its employees, by coercively interrogating and polling employees concerning their union views, sympathies, and voting intentions, and by threatening employees with economic reprisals because of their union activities (Pet. 42–43, 66–67).

The Board ordered (Pet. 44, 75–77) the Company to cease and desist from the unfair labor practices found and from any like or related misconduct, and to post appropriate notices.[4]

C. THE COURT OF APPEALS' DECISION

The court of appeals (Judge Bryan dissenting) concluded that substantial evidence supported the

[4] The Board, in the representation proceeding which was consolidated for hearing with the unfair labor practice case, also sustained the Union's objections to the November 16 election and set it aside (Pet. 41, 68–69, 77).

Board's unfair labor practice findings and enforced the Board's order (Pet. 27–36). It further held that it had no jurisdiction to review the representation case (see n. 4, *supra*), and dismissed the Company's petition for review insofar as it challenged the Board's determination of voting eligibility in the November 16 election and its action in setting aside that election (Pet. 25–27).

ARGUMENT

1. The court of appeals sustained the Board's finding that the Company's pre-election speeches considered as a whole threatened the pipefitters with loss of employment if they selected the Union as their collective bargaining representative in the coming Board election and promised them continued employment if they rejected the Union (Pet. 30–31). In these circumstances, the Company's contention (Pet. 5–12) that the speeches were only an expression of views and opinion privileged by Section 8(c) of the Act presents solely an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. A different conclusion is not required by the Company's contention (Pet. 6–12) that the speeches could not be found to contain threats or promises of benefits because, separately considered, the statements made were all privileged. As the court of appeals pointed out: "Words and phrases, each lawful when considered alone, can be united in such a fashion as to yield an improper end product" (Pet. 30). The Board and the court of appeals

reasonably held that the statements here were so united.[5]

2. There is no merit to petitioner's contention that the court of appeals had jurisdiction under Sections 9(d) and 10(f) of the Act to review the voter eligibility rules set forth in the Board's decision and direction of election in the representation proceeding (Pet. 12–15). As the court of appeals pointed out, those sections of the Act permit a court of appeals to review Board action in a representation proceeding only "when review is sought in an unfair labor practice case which is based in whole or in part upon a Board certification in a representation case" (Pet. 25). *National Labor Relations Board* v. *Falk Corporation,* 308 U.S. 453; *A.F. of L.* v. *National Labor Relations Board,* 308 U.S. 401; *National Labor Relations Board* v. *Int. Brotherhood,* 308 U.S. 413; see *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 479. The representation decision here did not form the basis of the unfair labor practice order before the court of appeals. Petitioner will have an opportunity to have its contentions respecting the election reviewed when, and if, the Union wins a second election, is certified, and the Board orders petitioner to bargain based on that certification. Petitioner's reliance (Pet. 13–14) upon *Leedom* v. *Kyne,* 358 U.S. 184, is misplaced; that case concerned district court jurisdiction, the Court

[5] It may be noted that, even apart from the speeches, the Company's other coercive conduct (pp. 4–5, *supra*), which is not contested here, furnishes substantial support for the Board's order.

expressly noting that no question of the jurisdiction of the courts of appeals to review Board orders under the Act was involved (at p. 188).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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